Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Joint Petition of BellSouth, SBC, and Verizon for Elimination of Mandatory Unbundling of High-Capacity Loops and Dedicated Transport	)	

OPPOSITION OF BELLSOUTH CORPORATION, SBC COMMUNICATIONS, INC., AND THE VERIZON TELEPHONE COMPANIES

NewSouth's Motion to Dismiss the above-captioned Joint Petition must be denied. Contrary to NewSouth's claims, the UNE Remand Order and the Commission's Rules do not preclude the Joint Petition; nor could they under the requirements of the Act.

I. NewSouth's Interpretation of the UNE Remand Order Is Inconsistent with the Act and the Plain Language of that Decision.

NewSouth argues that the UNE Remand Order prevents ILECs from seeking to remove UNEs from the national "list" during a "three-year quiet period." Motion to Dismiss at 1-4. The Order, however, does no such thing – indeed, the Commission could not impose such a requirement consistent with the Act. The Commission may mandate access only to those UNEs that satisfy the Section 251(d)(2) standard. Because lack of access to high-capacity loops and dedicated transport would not impair a requesting carrier's ability to provide the services it seeks to offer, compelling continued access to

these elements would violate the Act.[1] In addition, ignoring marketplace developments for three years, as NewSouth urges, would violate Congress's requirement that the Commission perform a biennial review of all telecommunications-related regulations and eliminate those that are "no longer necessary in the public interest as the result of meaningful economic competition ...." 47 U.S.C. § 161.

NewSouth's interpretation of the UNE Remand Order also could prevent the Commission from making a rational decision regarding the conversion of special access services into UNEs. Specifically, the Commission cannot reasonably conclude that the lack of access to combinations of high-capacity loops and dedicated transport would impair requesting carriers if, as the Joint Petition demonstrates, those elements individually do not meet the impairment test.[2] Turning a blind eye to that evidence would be indefensibly arbitrary.

In any event, NewSouth reads far too much into the UNE Remand Order. In discussing future changes to the list, the Commission stated only that it "would be inconsistent with our overall policy goals to consider petitions to remove elements from the national list *immediately* upon adoption of this order" and that it did not wish to

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[1] In addition, as the Joint Petition makes clear, and as each of the petitioners explained in its comments in the UNE/special access proceeding, overbroad unbundling undermines investment by both ILECs and CLECs and impedes innovation. These effects further flout Congress's fundamental goals of promoting a pro-competitive, deregulatory national policy framework and fostering the deployment of advanced services and capabilities. *See* Joint Petition, section III; Comments of SBC and Verizon, CC Docket No. 96-98, filed April 5, 2001, section III; Comments of BellSouth, CC Docket No. 96-98, filed April 5, 2001, section VI.C.

[2] The joint petitioners have presented compelling evidence in their filings in the UNE/special access proceeding that denying the ability to convert special access services into loop/transport combinations would not impair competitors regardless of whether the individual elements meet the Section 251(d)(2) standard.

entertain, "on an *ad hoc* basis, *numerous* petitions to remove elements from the list ...."[3] The Joint Petition implicates neither concern: it was submitted roughly a year and a half after the release of the UNE Remand Order as a joint filing of three large ILECs. Moreover, in contrast to a multitude of requests from CLECs to expand the unbundling obligations, it is the only pleading that has been filed seeking to remove an element from the national list.

Nor did the Commission preclude the possibility that it would eliminate certain unbundling obligations prior to three years. To the contrary, the Commission acknowledged that, "as market conditions change and new technologies develop," it would need to "reevaluat[e] the availability of alternative network elements outside the incumbent's network ... [to] truly determine whether the incumbent's network should be unbundled in order to meet the requirements of section 251 and the goals of the Act." UNE Remand Order, ¶ 149. The Commission therefore stated its intention to conclude such a re-evaluation every three years. *Id.*, ¶ 151 & n.268. It did not, however, foreclose the possibility that it might find that particular UNEs no longer meet the Section 251(d)(2) mandatory unbundling standard before that date: "it would be ... very difficult for us to predict, at this time, the date at which incumbent network elements would no longer be subject to unbundling obligations under section 251." *Id.*, ¶ 152.

The Joint Petition therefore is consistent with the UNE Remand Order.

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[3] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, 15 FCC Rcd 3696, ¶ 150 (1999) (emphasis added)("UNE Remand Order").

II. NewSouth's Procedural Arguments Are Mistaken.

Notably, NewSouth does not argue that there is no procedural vehicle by which the Commission can consider the Joint Petition. Instead, it asserts that granting the relief sought in the Joint Petition would require issuance of a Notice of Proposed Rulemaking. Motion to Dismiss at 4-5. That contention is erroneous, but even if it were correct, it would not justify dismissal of the Joint Petition.

The Commission may revise its rules without first issuing an NPRM "in any situation in which the Commission for good cause finds that notice and public procedure are ... unnecessary, or contrary to the public interest." 47 C.F.R. § 1.412(c). The Joint Petition presents that precise situation. An NPRM is unnecessary because the Joint Petition is discrete and clear in its scope, it contains detailed factual support that all affected parties will have an opportunity to comment on during the upcoming pleading cycle, and it is closely related to the issues being considered in response to the Fourth Further NPRM regarding conversion of special access services into UNEs. Moreover, the delay inherent in a two-step process would be inimical to the public interest and to the Act itself. ILECs would be compelled to continue providing these UNEs for a potentially lengthy period even though the statutory standard for mandating unbundling is not met, and such overbroad unbundling would have a deleterious impact on consumers and competition. Accordingly, while the Commission may treat the Joint Petition as a Petition for Rulemaking, it need not and should not delay granting the requested relief.[4]

[4] If the Commission nonetheless decides that it should proceed via NPRM, it should issue that document expeditiously upon conclusion of the comment cycle on the Joint Petition.

Even if NewSouth were correct that a two-step process is necessary here, it certainly is not correct that the Joint Petition must be dismissed as "premature" or "incomplete." *See* Motion to Dismiss at 5. The Joint Petition plainly satisfies the substantive requirements of the Commission's rules governing petitions for rulemaking: it identifies the rule that we seek to modify, the nature of the modification, and the "facts, views, arguments, and data deemed to support the action requested," and explains how our interests would be affected by the requested modification. *See* 47 C.F.R. § 1.401(c).

Finally, contrary to NewSouth's contention that the Commission can act only by rulemaking, the Commission also may grant the relief sought in the Joint Petition by forbearing from enforcing Rule 51.319 as applied to high-capacity loops and dedicated transport under Section 10 of the Act.[5] The forbearance test is met for the same reason that there is no impairment with respect to those UNEs. As interpreted by the Commission, the impairment standard examines whether there are sufficient alternatives outside the ILEC's network that a requesting carrier's ability to provide the service it seeks to offer is not materially diminished. UNE Remand Order, ¶ 51. If so, then of necessity the unbundling requirement would not be necessary to protect consumers, assure just and reasonable rates, or advance the public interest. *See* 47 U.S.C. §160(a). Indeed, a principal reason for limiting unbundling to those UNEs whose denial would cause an impairment is to promote "competitive market conditions" – which is a key

[5] The Commission also could grant an interim waiver of the relevant provisions of Rule 51.319 pending its formal review of the unbundling requirements as a whole. The factual and legal showing in the Joint Petition demonstrates that there is "good cause" for such action. *See* 47 C.F.R. § 1.3.

consideration in determining whether forbearance serves the public interest. *Id.* § 160(b).[6]

For these reasons, the Commission should deny NewSouth's Motion to Dismiss.

Respectfully submitted,

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[6] Although Section 10 bars the Commission from forbearing from Section 251 until that section has been "fully implemented," *id.* § 160(d), the Commission is free to forbear from enforcing its own rules. Moreover, forbearance here is necessary to assure *compliance* with Section 251(d)(2) rather than to excuse performance, since continued enforcement of Rule 51.319 for UNEs that do not meet the statutory impairment standard would violate the Act.

CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 7th day of May, 2001, I caused copies of the foregoing Opposition of BellSouth Corporation, SBC Communications, Inc., and The Verizon Telephone Companies to be sent via hand-delivery to:

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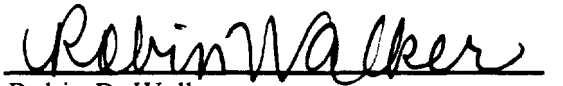

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